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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JENNIFER M. De HOOG et al., Plaintiffs and Appellants, v. WELLS FARGO BANK, N.A., as Trustee, etc., et al., Defendants and Respondents.	D074191 (Super. Ct. No. 37-2017-00018663-CU-OR-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Affirmed.

Law Offices of J. Carlos Fox and J. Carlos Fox for Plaintiffs and Appellants.

The Ryan Firm and Timothy M. Ryan, Andrew Mase for Defendant and Respondent Wells Fargo Bank, N.A., as Trustee, etc.

The Mortgage Law Firm and James F. Lewin for Defendant and Respondent The Mortgage Law Firm, PLC.

Plaintiffs and appellants Jennifer M. De Hoog and Scott K. De Hoog appeal from a judgment of dismissal entered after the trial court sustained without leave to amend the

demurrer of defendant and respondent Wells Fargo Bank, N.A. (Wells Fargo)[1] to plaintiffs' verified first amended complaint for cancellation of written instruments, quiet title, wrongful foreclosure, violations of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200) and slander of title. In sustaining the demurrer, the trial court rejected the plaintiffs' contentions that Wells Fargo's notices of default and sale, and the sale of the plaintiffs' property, were time-barred by virtue of its or its predecessor's inaction after a purported full reconveyance of the deed of trust was filed in March 2012. Plaintiffs contend the trial court's ruling was erroneous; that the March 2012 reconveyance terminated Wells Fargo's legal title to the property, and Wells Fargo, despite having constructive notice of that filing, did not seek to restore its title within five years. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We take the facts from the plaintiffs' verified first amended complaint, accepting as true material allegations but not contentions, deductions or conclusions of law, and considering matters that are judicially noticeable. (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512; *Heckart v. A-1 Self Storage, Inc.* (2018) 4 Cal.5th 749, 753-754.)

In August 2005, plaintiffs obtained a $553,600 loan from Bank of America, N.A. (Bank of America) secured by a deed of trust encumbering real property in Fallbrook, California (the property). The trust deed shows that PRLAP, Inc. was the trustee and

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1 The Mortgage Law Firm, PLC, has filed a joinder in the arguments made by Wells Fargo.

Bank of America was the lender. Plaintiffs thereafter sought a loan modification, but were told by a Bank of America representative that they would not be considered for it unless they fell behind in their payments and the bank could determine the identity of the investor on the loan. Plaintiffs eventually hired an attorney to negotiate with the bank. In or about March 2012, they were advised the negotiation was successful and the loan was being treated as " 'paid satisfied reconveyed.' " On March 8, 2012, an individual, Jerry E. Hartsoe, Jr., recorded a document entitled "Full Reconveyance" (the March 2012 reconveyance document), purporting to reconvey the property to plaintiffs on an asserted request reciting that "all sums secured by the Deed of Trust have been fully set-off, settled and discharged, and said Deed of Trust and the note or notes secured thereby having been surrendered for cancellation . . . ." Hartsoe signed the document under the words, "Bank of America, N.A., Trustee & Attorney-In-Fact." (Some capitalization omitted.)

Plaintiffs did not receive monthly billing statements for amounts owed under the Deed of Trust but occasionally received a statement demanding payments, and Bank of America did not report plaintiffs to credit reporting agencies regarding collecting under the note and deed of trust. Plaintiffs continued to pay the property taxes and insurance on the property until the end of June 2017.

After Hartsoe recorded the March 2012 reconveyance document, the Federal Bureau of Investigation (FBI) contacted plaintiffs and advised them their lawyers were engaged in a sham, and instructed them to make no further payments.

In January 2013, Bank of America recorded an assignment of the deed of trust to Wells Fargo. In October 2015, The Mortgage Law Firm, PLC, which that same month had been substituted as the new trustee under plaintiffs' deed of trust, recorded a notice of default declaring plaintiffs in breach of their obligations secured by the trust deed. It later recorded notices of trustee's sales in February 2016 and May 2017. The trustee's sale occurred in June 2017.

About a month before the trustee's sale, plaintiffs sued The Mortgage Law Firm, PLC, alleging a single cause of action for cancellation of written instruments. Following the sale of the property, they filed a verified first amended complaint adding Wells Fargo as a defendant, as well as causes of action for quiet title, wrongful foreclosure, violations of the UCL and slander of title. Among other allegations, plaintiffs alleged the deed of trust Wells Fargo sought to enforce "was extinguished in March of 2012" and that Wells Fargo thus had no right to undertake the foreclosure sale of plaintiffs' property. Plaintiffs' central claim was that Wells Fargo was "statutorily and legally precluded" from attacking the validity of the March 2012 reconveyance document because it waited in excess of five years to assert its interest in the property or cancel the March 2012 reconveyance document.

Wells Fargo demurred to the complaint, asking the trial court to take judicial notice of documents—an indictment and criminal judgment—indicating that Hartsoe had been charged and convicted of mail fraud and giving false information to the FBI, and arguing the March 2012 reconveyance was fraudulent and void on its face. Granting Wells Fargo's request for judicial notice, and based on "[Wells Fargo's] arguments,

Plaintiffs' admissions in their verified pleadings, and judicially noticeable information," the court sustained the demurrer without leave to amend. It ruled the March 2012 reconveyance document was void on its face because Hartsoe was never substituted as the trustee under the deed of trust, even though he purported to name himself trustee on the document. It accepted Wells Fargo's further arguments that plaintiffs never tendered the amount of the secured indebtedness, nor did they show any documents were void or voidable for purposes of their cause of action for cancellation. It denied leave to amend on grounds all of plaintiffs' claims stemmed from their position that they no longer owed any portion of the 2005 mortgage due to the purported full reconveyance, and their allegations that they had defaulted on the mortgage in 2012 and had not paid on it since that time.

Thereafter, the court entered an order adopting and incorporating its ruling, and dismissing the matter with prejudice.[2] Plaintiffs filed this appeal from the judgment of dismissal.

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2 The dismissal order was a " 'written order signed by the court and filed in the action' " and thus constituted an appealable judgment. (*Ward v. Tilly's, Inc.* (2019) 31 Cal.App.5th 1167, 1173, fn. 3, citing Code Civ. Proc., § 581d ["All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case."].)

DISCUSSION

I. *Standard of Review*

In testing the sufficiency of a complaint against a general demurrer, we apply well settled rules. " ' " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment . . . . " ' [Citation.] ' "The burden of proving such reasonable possibility is squarely on the plaintiff." ' " (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc*. (2016) 1 Cal.5th 994, 1010; see also *Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, 924 (*Yvanova*).)

Our review is de novo. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc., supra*, 1 Cal.5th at p. 1010.) "We may affirm on any basis stated in the demurrer, regardless of the ground on which the trial court based its ruling." (*Ward v. Tilly's, Inc., supra*, 31 Cal.App.5th at p. 1174.)

II. *Analysis*

In challenging the court's demurrer ruling, plaintiffs organize their briefing into "Factual" and "Legal" arguments. They focus solely on their contention that Wells Fargo's actions in foreclosing on the property were untimely; they do not address the

elements of the operative complaint's causes of action for cancellation of instruments, quiet title, wrongful foreclosure, violations of the UCL and slander of title; their pleading of those elements; or how the facts pleaded are sufficient to establish those elements. (See *Yvanova*, *supra*, 62 Cal.4th at p. 929; *Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062-1063.) They do not address the trial court's ruling that plaintiffs failed to allege they tendered the amount of the secured indebtedness and could not allege that any particular instrument was void or voidable. To the extent the court sustained Wells Fargo's demurrer on grounds plaintiffs had not sufficiently alleged causes of action apart from the timeliness of Wells Fargo's actions or any statute of limitations issue, plaintiffs have not affirmatively demonstrated error. (See *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052 ["In order to prevail on appeal from an order sustaining a demurrer, the appellant must affirmatively demonstrate error. Specifically, the appellant must show that the facts pleaded are sufficient to establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer"]; see also *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 9, fn. 2 ["where [a] demurrer [is] sustained without leave to amend, appellant's failure to advance arguments in connection with one of several causes of action . . . [is] deemed an abandonment of such cause of action"].) We limit our review to the statute of limitations issue.

A. *Plaintiffs*' "*Factual Arguments*"

In their asserted "factual" arguments, plaintiffs suggest the trial court was obligated to address the statute of limitations issue before deciding the legitimacy of the

purported full reconveyance, but ignored the timeliness issue and "simply accepted [Wells Fargo's] unverified and irrelevant assertion as to the lack of status of the trustee identified in the [March 2012 reconveyance document] . . . ." To support this contention, plaintiffs argue: (1) the March 2012 reconveyance document is not void on its face but "speaks for itself" such that anyone viewing the public record would conclude Wells Fargo's legal title to the subject property was terminated; (2) Hartsoe's status was irrelevant where Wells Fargo had constructive and actual notice of the March 2012 reconveyance; and (3) whether Hartsoe was the trustee at the time the March 2012 reconveyance document was recorded is a not a matter that can be judicially noticed but must be established as a fact (presumably in a trial), because "California law does not require a lender to record a substitution of trustee to be recorded [*sic*], and as such the identity of the trustee at the time [of the purported full reconveyance]. . . could have changed multiple times over the years without the need to record the change." (Some capitalization omitted.)

With the exception of the latter argument, plaintiffs do not support these claims with reasoned legal argument and authority; consequently we treat them as waived. (See *Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 383.) As for the propriety of the court taking judicial notice of Hartsoe's status, the sole authority plaintiffs cite for their proposition is *Ram v. OneWest Bank, FSB, supra*, 234 Cal.App.4th 1. But they provide no pinpoint cite to *Ram,* and understandably so, because we found no discussion in *Ram v. OneWest Bank* concerning judicial notice of such a fact, or even judicial notice generally. And, plaintiffs cite no authority for the

proposition that California law does not require a lender to record a substitution of trustee. The absence of supporting authority permits us to disregard these contentions without addressing their merits.

We observe in any event that the court here based its ruling on "judicially noticeable information," which properly included the "existence and facial contents" of the recorded deed of trust, its assignment, the substitution of trustee, the notices of default and the trustee's deed upon sale. (*Yvanova*, *supra*, 62 Cal.4th at p. 924, fn. 1 [existence and facial contents of recorded deed of trust, assignment of the deed of trust, substitution of trustee, notices of default and of trustee's sale, and trustee's deed upon sale were proper subject of judicial notice (Evid. Code, §§ 452, subds. (c), (h), 453), mandating judicial notice by the reviewing court (Evid. Code, § 459, subd. (a))], citing *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-266 [holding it was proper for a trial court to take judicial notice of the "parties to the transaction reflected in a recorded document" as well as "the document's legally operative language" so as to deduce and rely on the legal effect of the recorded document when that effect is clear from its face], disapproved on other grounds in *Yvanova*, at p. 939, fn. 13; *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1338.) Here, the trial court properly took judicial notice of the deed of trust identifying PRLAP, Inc. as the original trustee (exhibit A to the original complaint), and accepted PRLAP's trustee status as a fact in the absence of any substitution of the trustee at the time Hartsoe—a third party stranger having no legal ability to act as the trustee—recorded the March 2012 reconveyance document. There is no basis to conclude the court erred by

judicially noticing this fact and disregarding any conflicting allegations. (See, e.g., *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 36-39.)

B. *Plaintiffs' "Legal" Arguments*

Plaintiffs' self-titled legal arguments fare no better. Ignoring the trial court's ruling taking judicial notice of Wells Fargo's evidence of Hartsoe's indictment and conviction and declaring the reconveyance facially void, they contend the March 2012 reconveyance document terminated Bank of America's legal title to the property, and transferred both legal title and possession back into their name. Relying on *Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319 (*Robertson*) and *Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721 (*Zakaessian*), they maintain that Bank of America had either three or five years to assert and protect its rights to the property or claim the March 2012 reconveyance document was fraudulent. According to plaintiffs, Bank of America had actual and constructive notice of the purported full reconveyance and knew plaintiffs had made no mortgage payments for 70 months, but did nothing. They maintain "absent some timely affirmative act, at the time . . . Bank of America assigned its interests in the Deed of Trust to Appellant [*sic*], it had nothing to assign, and [Wells Fargo] was estopped from taking any action on the Deed of Trust that was extinguished in March of 2012 . . . ." Thus, plaintiffs argue, Wells Fargo had "no right" in June 2017 to undertake a nonjudicial foreclosure sale of the property.

These arguments are meritless. We have already held the trial court properly took judicial notice of the fact, among others, that the lawful trustee to the deed of trust in

March 2012 was PRLAP, Inc., not Hartsoe. That judicially noticeable fact permitted it to disregard plaintiffs' allegations that the deed of trust was extinguished in March 2012 by virtue of the purported March 2012 reconveyance document. Because Hartsoe was not the lawful trustee on the deed of trust and had no authority to execute or record a purported reconveyance on behalf of Bank of America either as its attorney in fact or as trustee, the court did not err by ruling the March 2012 reconveyance document was void on its face, and did not divest Wells Fargo or Bank of America of legal title to the property. (See *Schiavon v. Arnaudo Brothers* (2000) 84 Cal.App.4th 374, 380 ["[A] forged document is void *ab initio* and constitutes a nullity; as such it cannot provide the basis for a superior title as against the original grantor"; this rule applies to the reconveyance of the property interest under a deed of trust, as well as the conveyance of property by grant deed]; *Wutzke v. Bill Reid Painting Service, Inc.* (1984) 151 Cal.App.3d 36, 39, 42 [where a deed of reconveyance falsely represented that the trustee had received from the beneficiary a written request to reconvey from the trustor and that all sums secured by the deed of trust had been paid, it was void and a nullity].)[3] That allegation

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3 We observe that forgery is not limited to merely purporting to sign another person's name. " ' " 'Forgery, at common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.' " ' [Citations.] 'The crime of forgery is complete when one makes or passes an incorrectly named instrument with intent to defraud, prejudice, or damage, and proof of loss or detriment is immaterial.' [Citation.] '[T]he test is whether upon its face it will have the effect of defrauding one who acts upon it as genuine.' " (*People v. Franco* (2018) 6 Cal.5th 433, 439.) The gravamen of forgery is intent to defraud. (*Ibid.*) The facts judicially noticed by the trial court permitted it to conclude that Hartsoe had the intent to defraud when he prepared, executed, and recorded

was the basis for plaintiffs' claim that the reconveyance triggered some period of time by which Wells Fargo or its predecessor were required to act to protect their interests. As we have explained, plaintiffs have not meaningfully challenged the court's finding that the March 2012 reconveyance document was void on its face because it was executed and recorded by an individual without legal authority to act as the trustee. They have given us no reason to disturb its ruling to that effect. (Accord, *Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1457 [plaintiffs forfeited claims made without meaningful legal analysis supported by citations to authority or citations to facts in the record to support the claim of error; and conclusory claims of error failed for adequate factual or legal analysis].) Their assertion that the March 2012 reconveyance document terminated Bank of America's legal title is just that: an assertion not supported by argument or authority.

More specific to the points raised above, both *Robertson* and *Zakaessian* address statutes of limitations applicable to actions to set aside and cancel void instruments, or, in *Robertson*, actions more generally impacting the possession or title to real property. (See *Robertson*, *supra*, 90 Cal.App.4th at pp. 1235-1238 [addressing five-year limitations periods in Code of Civil Procedure sections 318 and 319]; *Zakaessian*, *supra*, 70 Cal.App.2d at p. 725 ["Ordinarily a suit to set aside and cancel a void instrument is governed by section 343 of the Code of Civil Procedure" unless fraud or mistake were involved in which case the three year period of Code of Civil Procedure section 338, subdivision (4) would apply]; see also *Walters v. Boosinger* (2016) 2 Cal.App.5th 421,

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the March 2012 reconveyance document identifying himself as a Bank of America attorney in fact and trustee.

428-433 [addressing *Robertson* and *Zakaessian*, among other cases, and statutes of limitation on claims premised on theory that a deed is void].)

Wells Fargo's effort to enforce the deed of trust in this case was not an action to set aside or cancel a void instrument, nor was it a generalized action relating to title to or possession of property to which the aforementioned limitations period applied. Rather, it is a judicially noticeable fact that Wells Fargo—the current beneficiary of the trust deed having received an assignment from Bank of America—was exercising its right to enforce the deed of trust via nonjudicial foreclosure. (See *Yvanova, supra,* 62 Cal.4th at pp. 926-927 [discussing process of nonjudicial foreclosure].) That process is governed by 10 or 60-year enforcement periods, which respectively commence from an ascertainable final maturity date or last date fixed for payment of the debt (10-year period) or the recordation date of the instrument that created the security interest (60-year period). (Civ. Code, § 882.020, subd. (a); see also Legis. Com. com., 7 West's Ann. Cal. Civ. Code, (2007 ed.) foll. § 882.020, p. 437; *Ung v. Koehler* (2005) 135 Cal.App.4th 186, 190-191, 193 [a deed of trust does not expire until the debt is paid].) Hence, the limitations periods discussed by plaintiffs have no application to Wells Fargo's efforts.

"A demurrer may be sustained where judicially noticeable facts render the pleading defective [citation], and allegations in the pleading may be disregarded if they are contrary to facts judicially noticed." (*Intengan v. BAC Home Loans Servicing LP, supra,* 214 Cal.App.4th at p. 1052; *Schep v. Capital One, N.A., supra,* 12 Cal.App.5th at p. 1338.) Such is the case here.

III. *Leave to Amend*

To determine whether the trial court should have granted plaintiffs leave to amend, we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint's legal defect or defects. (*Yvanova*, *supra*, 62 Cal.4th at p. 924.) If there is a reasonable possibility that the defect can be cured by amendment, the court has abused its discretion and we reverse, if not there is no abuse of discretion and we affirm. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Citrus El Dorado, LLC v. Chicago Title Company* (2019) 32 Cal.App.5th 943, 947.) "[T]he burden falls upon the plaintiff to show what facts he or she could plead to cure the existing defects in the complaint. [Citation.] 'To meet this burden, a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action.' " (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 792; see also *Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 369; *Blank v. Kirwan*, at p. 318 [burden in this regard is "squarely on the plaintiff"].)

Plaintiffs here have not attempted to meet this burden. They have not argued on appeal that the court abused its discretion by not allowing them to further amend their complaint, or that they can further amend the complaint to allege facts constituting a cause of action. Accordingly, the court did not abuse its discretion in granting Wells Fargo's demurrer to the complaint without leave to amend.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.